

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of :

STUDENT,

Petitioner,

vs.

MENLO PARK CITY SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2005090654

DECISION

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on March 21 and March 22, 2006, in Atherton, California.

Petitioner (Student) was represented by her mother. Student's father also attended the majority of the hearing.

Respondent Menlo Park City School District (District) was represented by Deputy County Counsel David Nibbelin. Olivia Mandilk, Director of Student Services, was also present on behalf of the District

Student called the following witnesses: Michael Moore, principal at Hillview Middle School (Hillview); Joy Shmueli, vice-principal at Hillview; Heather LaBonte; and Dr. Frank Marone, behavior analyst. Student's mother also testified.

The District called the following witnesses: Jo Camper, speech language (SL) therapist; Mike Dunn, resource teacher; Jennifer Hutsell, Student's eighth grade Core teacher; Julie Willard, Student's eighth grade science teacher; Joy Shmueli, vice-principal; Mark Schack, Student's eighth grade math teacher; Deborah Devoto, school psychologist; Dr. Susan Burkhardt, clinical psychologist; and Olivia Mandilk, Director of Student Services for District.

Oral and documentary evidence were received during the hearing. Student's mother waived closing argument. Mr. Nibbelin argued his case on March 22, 2006; the matter was submitted and the record was closed.

ISSUES

- I. Did the District deny Student a free appropriate public education (FAPE) by failing to provide monthly progress reports and report cards during the second and third terms of the 2004-2005 school year?
- II. Did the District deny petitioner a FAPE by failing to implement behavior support services from March 2005 to June 2005 as required by the March 5, 2004 Individualized Education Program (IEP)?
- III. Did the District deny petitioner a FAPE by failing to have a speech language therapist present at the November 4, 2004 IEP meeting?
- IV. If the above are true, is petitioner entitled: (a) to compensatory education for behavior support services and speech and language services, or a monetary lump sum to provide those services if the District is unable to provide the services; (b) to have the ALJ order that Hillview Middle School give a graduation diploma to Student, and modify Student's file; (c) to have the ALJ order that Student's file be purged of any letter or emails sent to parents regarding graduation?

FINDINGS OF FACT

1. During the 2004-2005 school year, Student was in the eighth grade and attended Hillview in the District. Student's last agreed upon IEP was signed by her parents on March 5, 2004. The primary disability listed in the IEP was Speech Language Impaired (SLI). The IEP indicates that Student should be provided behavioral support and speech consultation for pragmatics. The IEP requires that Student be given speech therapy consultation by a "District Specialist" for 30-minutes per month. However, the IEP does not list any specific speech goals or objectives. The IEP also does not include any requirements that progress reports or grade reports be handled in any specific manner. During the 2004-2005 school year, Student attended regular education classes that included CORE curriculum, science and math.

2. In the second and third trimesters of the 2004-2005 school year, the District notified Student and Student's parents that Student had not returned a physical science book and that her math book had been defaced. The District notified Student and her parents that the District would withhold Student's report cards until Student paid for the defaced book and returned the overdue book. The District indicated that this was the policy of the District and pertained to all students. The physical science book had been missing since December 2004 and was valued at \$55. The defaced Algebra book was valued at \$60. The third notice of missing physical science book was sent on May 17, 2005. The notice of defaced Algebra book was sent on June 10, 2005.

3. Jennifer Hutsell, Student's eighth grade CORE teacher, sent bi-weekly progress reports to Student's parents and to Mr. Dunn, Student's resource teacher and case manager. The progress reports were generally emailed to the parents and Student's mother generally responded with an email acknowledging the receipt of the report. Ms. Hutsell also sent home mid-trimester report cards and an end of trimester report card. Ms. Hutsell specifically recalled doing all progress reports and grade reports for Student. Ms. Hutsell worked with Dr. Marone on Student's behalf and then with Method Management when they took over the behavioral support.

4. Julie Willard, Student's eighth grade science teacher, sent bi-weekly progress reports home to Student's parents both by email and hardcopy. Ms. Willard had frequent contacts with Student's parents, who preferred to communicate through email. Ms. Willard responded to all email received from Student's parents. Ms. Willard always sent reports to Student's parents and a signed copy was returned or Student received a detention. Ms. Willard worked closely with Method Management the last half of the year. They visited her classroom often.

5. Mark Schack, Student's eighth grade math teacher, sent five to ten progress reports to Student's parents per trimester. Mr. Schack also mailed mid-trimester grade reports that were signed and returned by parents.

6. Deborah Devoto, Student's eighth grade counselor, placed Student on a watch list of students at risk for not graduating. Ms. Devoto followed Student's progress closely and passed along all progress reports and information about Student to both Mr. Dunn and Mike Moore, the school principal. Ms. Devoto also worked closely with Method Management to help Student complete the necessary work so that Student could graduate.

7. Joy Shmueli, the vice-principal at Hillview, testified and established that report cards were sent three times per year for the majority of students, but that some subjects only generated two report cards. The school provided updates on goals and objectives as part of the IEP process, but those updates were not sent with report cards. It was school policy to withhold report cards for all students who had not paid for or returned missing or damaged books. The policy applied to all students, including special education students.

8. Student's mother testified that she did not receive any progress reports from Student's teachers during the second and third trimesters. To the extent that there is a conflict in the testimony of the witnesses, the ALJ finds that the witnesses for the District were more credible and believes those witnesses.

9. Student had received behavioral support services since she was in kindergarten through Dr. Frank Marone, a licensed Applied Behavioral Analyst who contracted with the District. During the 2004-2005 school year, a breakdown in communication occurred between the District and Dr. Marone, culminating in the District terminating his contract on March 5, 2005. On March 17, 2005, the District contracted with a new behavioral support provider called Method Management Consultants which was run by two highly qualified

behaviorists, Dr. Susan Burkhardt and Dr. Julie Robinson. Dr. Burkhardt and Dr. Robinson are both clinical psychologists. Method Management Consultants began providing services to Student on March 17, 2005, though they did not meet Student until April 2005. The contract was not signed until June 2005, but the services were in place and being provided to Student effective March 17.

10. Dr. Burkhardt originally met Student when Student was in kindergarten and Dr. Burkhardt worked with Dr. Marone. Dr. Burkhardt began providing services to Student on March 17, 2005, but did not meet Student until April 26, 2005. Much of the time between March 17 and April 26 was spent meeting with Hillview staff regarding Student, reviewing files, meeting the parents and working toward developing and implementing a plan that worked for Student. The March 5, 2004 IEP allowed three hours per week of consultative services for Student, but Dr. Burkhardt was putting in many more hours. Dr. Burkhardt was highly qualified to provide services to Student.

11. On November 4, 2004, an IEP meeting was held at Student's parent's request to discuss Student's performance in Student's core classes. The District stipulated at the due process hearing that a speech and language therapist did not attend the November 4, 2004 IEP meeting. Ms. Mandilk excused Jo Camper, the speech therapist, from attending the IEP meeting because Ms. Camper was a new speech therapist, was unfamiliar with the school and curriculum, had not met Student and was not providing any direct services to Student. At the November 4, 2004 IEP, all parties agreed that the resource specialist was in a better position to provide the speech consultative services to Student and that Student should be exited from SL therapy but receive the SL hours as resource specialist consultation. Student's mother agreed, but did not sign the IEP. Ms. Mandilk spoke to Ms. Camper prior to the meeting and discussed Student and her needs. Ms. Camper was in agreement to exit Student from speech services.

12. Ms. Camper was briefed about Student by Brooke Bottari, who provided speech services for Student until August 2004. Ms. Camper agreed that Student should be exited from speech since there were no speech goals listed in the IEP, and that the resource teacher could provide the required consultative services. Ms. Camper never attended an IEP for Student.

CONCLUSIONS OF LAW

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400, et seq.; Ed. Code §56000, et seq.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. §1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. §1401(29).) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be

required to assist a child to benefit from special education. (20 U.S.C. §1401(26).) California provides that designated instruction and services (DIS), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code §56363, subd. (a).)

2. Once a child is identified under the IDEA as handicapped, the local education agency must: identify the unique educational needs of that child by appropriate assessment, create annual goals and short-term benchmarks to meet those needs, and determine specific services to be provided. (Ed. Code §§56300–56302; 20 U.S.C. §1412.)

3. A student's IEP must be reasonably calculated to provide the student with some educational benefit, but the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 198-200.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.)

4. The petitioner in a special education administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v Weast* (2005) 546 U.S. ____; 126 S.Ct. 528.)

5. The individualized education program team shall include, at the discretion of the parent, guardian, or the local educational agency, individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate. The determination of whether the individual has knowledge or special expertise regarding the pupil shall be made by the party who invites the individual to be a member of the individualized education program team. (Ed. Code §56341(b)(6).)

6. Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 650, fn. 9 (lead opn. of Alarcon, J.).) In separate opinions, concurring in part and dissenting in part, Judges Gould and Clifton agreed that procedural errors were subject to a harmless error test, but must be reviewed to determine whether the error resulted in a loss of educational opportunity to the student. (*Id.* at 652, 658.)

7. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE unless a procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E).)

8. The IDEA inquiry is twofold. The first inquiry is whether the school district has complied with the procedures set forth in the IDEA. The second inquiry is whether the

developed IEP provides the student with a FAPE by meeting the following substantive requirements: (1) has been designed to meet Student's unique needs; (2) has been reasonably calculated to provide Student with some educational benefit; and (3) comports with Student's IEP.¹

9. As discussed below, petitioner has failed to meet her burden of proof by a preponderance of the evidence.

I. Did the District deny Student a FAPE by failing to provide monthly progress reports and report cards during the second and third terms of the 2004-2005 school year?

10. As stated in factual findings 1 to 7, the District provided progress reports and report cards to Student during the second and third trimesters of the 2004-2005 school year. The IEP did not require the District follow any special procedures for Student regarding progress reports and report cards. Therefore, the District did not deny Student a FAPE since they provided all necessary progress reports and grade reports to Student.

II. Did the District deny petitioner a FAPE by failing to implement behavior support services from March 2005 to June 2005 as required by the March 5, 2004 IEP?

11. As stated in factual findings 1, 9 and 10, the District ensured that Student had a behavior support network in place pursuant to the March 4, 2005 IEP.

12. As stated in factual findings 1 and 9, the IEP required that Student receive three hours per week of behavioral support consultation. The District did not provide behavioral support services from March 5 to March 17, 2005. This is a procedural violation of the IDEA.

13. To the extent that the District committed a procedural violation of the IDEA, the ALJ finds the error was harmless. The total missed behavioral consultation time was six hours and Student was being closely monitored by her teachers and counselor. Therefore, the missed consultation hours did not impede Student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or cause a deprivation of educational benefits. Thus, the District did not deny Student a FAPE regarding behavioral support services.

¹ The District was also required to provide Student with a program which educated him in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of her disabilities was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. §1412(a)(5)(A); Code § 56031.) LRE is not an issue in this case.

III. Did the District deny petitioner a FAPE by failing to have a speech language therapist present at the November 4, 2004 IEP meeting?

14. As stated in factual finding 11, the District did not have a speech language therapist present at the November 4, 2004 IEP.

15. As stated in factual findings 11 and 12, the District representative spoke with the speech language therapist prior to the IEP meeting. The speech therapist did not provide direct services to Student, had never met Student, and was in agreement that Student should be exited from speech services. Based upon the nature of the discussions at the November 4, 2004 IEP, particularly exiting Student from speech services, the District committed a procedural violation of the IDEA by not having a speech therapist present.

16. The ALJ finds that the District's failure to have a speech language therapist present at the IEP was harmless error. The Student did not have any goals or objectives related to speech services in her IEP. The absence of a speech therapist did not impede Student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or cause a deprivation of educational benefits. Therefore, there was no FAPE denial to Student based upon the failure of the District to have a speech therapist present at the November 4, 2004 IEP.

IV. If the above are true, is petitioner entitled: (a) to compensatory education for behavior support services and speech and language services, or a monetary lump sum to provide those services if the District is unable to provide the services; (b) to have the ALJ order that Hillview Middle School give a graduation diploma to Student, and modify Student's file; (c) to have the ALJ order that Student's file be purged of any letter or emails sent to parent's regarding graduation?

The request for relief listed above is denied in light of the findings made on Issues I, II and III.

ORDER

1. Petitioner's request for relief is denied.

PREVAILING PARTY

2. Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on all issues heard and decided.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code §56505, subd. (k).)

DATED: April 4, 2006

RICHARD M. CLARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings